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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1344

TI TI PEAT HUMUS COMPANY, INC., PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 373 F.2d 209. The opinion of the district court (Pet. App. A) is reported at 249 F.Supp. 166.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1967. A petition for rehearing was denied on March 10, 1967. The petition for a writ of certiorari was filed on May 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether peat humus is an "agricultural commodity" within the meaning of the exemptions provided in Sections 13(a)(6) and 13(a)(10) of the Fair Labor Standards Act, and the definition of "agriculture" contained in Section 3(f).

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth at Appendix C to the petition.

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act to restrain petitioner from continuing to violate the minimum wage, overtime and record-keeping provisions of the Act. Petitioner is engaged in processing, packing and selling peat humus which it extracts from a low-lying, waterlogged tract of land in South Carolina. It contends that it is exempt from the provisions of the Act by virtue of Sections 13(a)(6) and 13(a)(10),[1] which provided exemptions for "any employee employed in agriculture" as defined in Section 3(f), and for "individual[s] employed within the area of production (as defined by the Secretary), engaged in

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[1] Section 13(a)(10) was deleted from the Act by the Fair Labor Standards Amendments of 1966 (80 Stat. 830, 834-835), which became effective February 1, 1967.

handling * * * agricultural or horticultural commodities for market." Petitioner urges that peat humus is such an "agricultural commodity" within the meaning of the Act.

The peat deposits are found in a watery or marshy bog of 40 acres located on a leased 2000-acre tract (Pet. App. A18). As the district court found, the deposits are "composed of decaying and decayed plants * * *, some of which have apparently been recently growing, and others which have been decayed, accumulated, and preserved in the waterlogged area over a period of several hundred years" (*id.* at A5). Petitioner had not planted or cultivated any growing plants which would contribute to the accumulated vegetation in the bog (*id.* at A19).

Petitioner's operation consisted of draining the bog, clearing it of trees and other growth, and extracting peat humus by means of various mechanical implements such as harrows, tillers, front-end loaders and tractors (*ibid.*). The peat was then transported to petitioner's nearby plant, screened and bagged, or loaded onto trucks for bulk shipment (*ibid.*).

The district court held that peat humus is an agricultural commodity within the meaning of the claimed exemptions (*id.* at A14), and accordingly denied the Secretary's request for an injunction (*id.* at A14-A15). The court of appeals reversed, ruling that peat humus was not an agricultural commodity under the Act—a conclusion for which it found "the rationale of [the pertinent] cases is persuasive, particularly so when considered in conjunction with the stated policy of the Act, the legislative history and

the subsequent administrative and congressional treatment" (Pet. App. A23).

ARGUMENT

The decision below conforms with the legislative history and the consistent administrative interpretations of the applicable statutory provisions, and presents no conflict with decisions of this Court or of any court of appeals. Further review is unnecessary.

1. As pointed out by the court of appeals (Pet. App. A20), it has been the longstanding and consistent interpretation of the Wage and Hour Administrator—first announced in 1942—that "the term 'agricultural or horticultural commodities,' as used in Section 3(f), means commodities which are planted and cultivated by man," and that "since peat moss is not such a commodity * * * the [agricultural] exemption * * * does not apply to employees engaged in extracting, processing and distributing peat moss" (1943 Wage and Hour Manual, p. 320; 1 CCH Labor Law Reporter, Wages-Hours, ¶ 25,250.638). In 1943, this interpretation received judicial confirmation in *Walling* v. *Georgia Peat Moss Co.*, 7 Labor Cases ¶ 61,622 (M.D. Ga. 1943) (not officially reported)—the only previous case in which the Administrator's position has been challenged. That case held that a company engaged in the production, sale and distribution of peat did not qualify for exemption from the Act under Sections 13(a)(6) or 13(a)(10).

Even earlier, the inapplicability of the agricultural exemptions to the extraction and handling of peat

was recognized by both the Administrator and the peat industry itself. In 1940 the industry applied for, and the Administrator granted, a limited overtime exemption which then Section 7(b)(3)[2] made available for industries found by the Administrator to be of a seasonal nature. The application for, and approval of, such partial exemption for the "excavating, mascerating, spreading, cutting or drying of peat material" (see 5 Fed. Reg. 4816)[3] would obviously have been unnecessary if the peat operations were considered to come within Section 13(a)(6) or 13(a)(10)—both of which would have afforded complete exemption from the Act's requirements.

That the foregoing interpretation of the scope of these exemptions accords with the congressional intent is substantiated by the legislative history of the original Act. It was assumed in the debates that the term "agricultural or horticultural commodities" means "ordinary agricultural commodities of the farm" and refers to "crops" which are the result of "cultivation and growing" (82 Cong. Rec. 1784, 1785), and that understanding was demonstrated by

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[2] Prior to February 1, 1967, Section 7(b)(3) provided a limited overtime exemption for 14 weeks a year for industries "found by the Administrator to be of a seasonal nature." The 1966 amendments to the Act (80 Stat. 830) repealed this provision, and added two new sections—Sections 7(c) and (d)—providing somewhat comparable seasonal industry exemptions.

[3] Because of the effect of weather on peat operations, the Administrator found that the industry was "seasonal" only in specified Northern States, and the Section 7(b)(3) exemption was accordingly limited to those States (5 Fed. Reg. 4816).

changes made to the language of Section 3(f) prior to its passage in 1938.[4]

Similarly, subsequent legislative action confirms the longstanding administrative intrepretation. Thus, in 1949 Congress extensively amended the Act without modification of the statutory language on which the Administrator's interpretation was based; moreover,

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[4] The Congressional understanding that the term "agricultural or horticultural commodities" had reference only to products of the soil which are cultivated by man is demonstrated by the addition of the word "production" to the list of primary agricultural activities contained in Section 3(f), coincident with the enlargement of that section (through reference to Section 15(g) of the Agricultural Marketing Act) to include the production of spirits of turpentine and gum rosin. The word "production" was added, as this Court has pointed out, "to take care of [this] special situation—the production of turpentine and gum rosins," which otherwise, Congress thought, "would not be considered agriculture, since turpentine is neither cultivated nor grown" (*Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 765).

Further evidence of Congress' intention to otherwise limit the meaning of "agricultural or horticultural commodities" to products which are cultivated by farming operations is found in its treatment of forestry activities. In the Senate bill (S. 2475, 75th Cong., 1st Sess.) "forestry" was originally listed as one of the primary farming operations in the definition of "agriculture". Before final passage of the bill, however, the term "forestry" was deleted from the primary part of the definition, and placed instead in the second part of the definition—*i.e.*, the part that deals with practices which are not necessarily farming practices in themselves but which are incidental to farming operations (see *Farmers Irrigation Co., supra*, 337 U.S. at 762-763). Such action—which resulted in exempting only those forestry operations which are carried on as an incident of the farming operations described in the primary part of Section 3(f)—is plainly inconsistent with any notion that the term "agricultural or horticultural commodities" includes all vegetation.

it provided in Section 16(c), that any existing "order, regulation or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor * * * shall remain in effect * * * except to the extent that [it] may be inconsistent with the provisions of this Act." 63 Stat. 910, 920. Since "the Administrator's interpretation [was] unimpaired by the 1949 Amendments," it "follows that the employees * * * are not within the Agricultural exemption." *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270. See also *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16-17; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 292.

Indeed, not only was there no change in 1949 to the language of Section 3(f), but Congress in that year added a new, separate exemption (now Section 13(a)(13)) for forestry operations—thus again demonstrating, as it had in its initial treatment of forestry in 1938 (see note 4, *supra*), that the exemption for "agricultural or horticultural commodities" was not intended to include all vegetation. Again in 1961, when the Act was further amended extensively (75 Stat. 65), Congress enacted another provision (as part of Section 13(d)) providing a limited exemption for, *inter alia*, evergreen harvesting operations, which, like the forestry exemption, would be unnecessary and redundant if such uncultivated products were considered to be "agricultural or horticultural commodities" within the meaning of the agricultural exemptions.

Most recently, in connection with the revision of the limited overtime exemption for seasonal industries in

the Fair Labor Standards Amendments of 1966 (80 Stat. 830), the committees of both the Senate and House, in describing the industries to which the new Section 7(c) would apply, stated that "[a]n example is the excavating of peat material in northern climes"[5] —thus recognizing, as had the industry and the Administrator in 1940, that the agricultural exemptions had no application to that activity.

2. Petitioner's reliance (Pet. 4-5) upon *Premier Peat Moss Corporation* v. *United States*, 147 F.Supp. 169, (S.D. N.Y.), affirmed *per curiam*, 355 U.S. 13, is misplaced. To be sure, the case held peat to be an agricultural commodity—but under an exemption of the Interstate Commerce Act, an exemption which the Interstate Commerce Commission had construed, the court noted in *Premier*, to include "numerous commodities which are not the result of tillage and cultivation; for example, forest products, wild berries, marsh hay, prairie grass, and Spanish moss," as well as "long-lived, slow-growing trees" and "other wild products" (147 F.Supp. at 173). In view of that administrative construction, the court reasoned, the Commission's "argument that peat moss is not within the definition because it is not produced by cultivation of the soil is * * * unpersuasive" (*ibid.*). In contrast, the administrative interpretation of "agricultural commodities" under the Fair Labor Standards Act has consistently excluded products which are not cultivated by man, and Congress, which has provided separate

[5] S. Rep. No. 1487, 89th Cong., 2d Sess., p. 15; H. Rep. No. 1366, 89th Cong., 2d Sess., p. 21.

exemptions for such activities as "forestry," has plainly held the same view.

The inconsistency between the interpretations of the two acts' exemptions is only a surface one, considering the different policies the acts serve. It is well established that the humanitarian purposes and remedial nature of the Fair Labor Standards Act require that its exemptions be "narrowly construed against the employers seeking to assert them" and their application be limited to those "plainly and unmistakably within their terms and spirit" (*Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Phillips Co.* v. *Walling*, 324 U.S. 490, 493). On the other hand, the Interstate Commerce Act's agricultural exemption is "designed to preserve for the farmers the advantage of low-cost motor transportation" (*East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 51, and there is no attendant overriding purpose that would be served by a narrow construction of that exemption—particularly since the exemption is only a partial one which does not remove carriers of agricultural commodities from the safety requirements of that Act (see 49 U.S.C. 303(b)). In view of these considerations the court below correctly concluded that the *Premier* decision was neither controlling nor persuasive with respect to the application of the Fair Labor Standards Act (Pet. App. A21).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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